

Supreme Court, U. S.
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-156

UNITED STATES OF AMERICA,

Petitioner,

v.

HUGH J. ADDONIZIO,

Respondent.

UNITED STATES OF AMERICA,

Petitioner,

v.

THOMAS J. WHELAN and THOMAS M. FLAHERTY,

Respondents.

**RESPONDENT, HUGH J. ADDONIZIO'S BRIEF, IN
OPPOSITION TO PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE THIRD CIRCUIT**

MICHAEL EDELSON

*Counsel for Respondent, Hugh J.
Addonizio*

Gateway I

Newark, New Jersey 07102

SCARPONE & EDELSON
Of Counsel

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Questions Presented

Whether the sentencing court has jurisdiction pursuant to a 28 U.S.C. §2255 motion to vacate and correct a defendant's sentence where new parole guidelines and procedures adopted, published and implemented subsequent to sentencing and prior to defendant's first parole eligibility date fundamentally changed the criteria applied in the parole decisionmaking process thereby thwarting the reasonable intention and expectation of the sentencing court at the time of imposition of sentence.

Statement

A. The parole release system

In 1972 and 1973 the Parole Board (now Parole Commission) radically changed the criteria and procedures applied in the parole decisionmaking process. This was accomplished by the adoption and application by the Parole Board of a guideline table, first as a "pilot project" in 1972 and then with nationwide application in 1973. 28 C.F.R. §2.4 (1973) The adoption of the guideline table represented not only the first time the Parole Board indicated its decisions would be based upon published criteria or guidelines; but substituted the previously accepted principal criterion in parole decisionmaking of rehabilitation for the Parole Board's "independent subjective evaluation of the gravity of the inmate's past criminal behavior". Project, *Parole Release Decisionmaking and the Sentencing Process*, 84 Yale L.J. 810, 822-828 (1975).

It was not until the enactment in 1976 of the Parole Commission and Reorganization Act (appearing as 18 U.S.C. §§4201 through 4218 and repealing the former

§§4201 through 4218 inclusive of Title 18) that specific statutory authority for the published guidelines and the new emphasis on an independent evaluation of the severity of the crime by parole authorities can be found. See 18 U.S.C. §4203(a)(1) and the present §4206(a), which reads:

"If an eligible prisoner has substantially observed the rules of the institution or institutions to which he has been confined, *and if the Commission, upon consideration of the nature and circumstances of the offense and the history and characteristics of the prisoner determines:*

(1) That release would not depreciate the seriousness of his offense or promote disrespect for the law; and

(2) That release would not jeopardize the public welfare; subject to the provisions of subsections (b) and (c) of this section, and pursuant to guidelines promulgated by the Commission pursuant to Section 4203(a)(1), such prisoner shall be released." (Emphasis added)

By contrast, the prior §4203, in effect in 1970 when respondent was sentenced, provided, *inter alia*:

"If it appears to the Board of Parole from a report by the proper institutional officers or upon application by a prisoner eligible for release on parole, that there is a reasonable probability that such prisoner will live and remain at liberty without violating the laws, and if in the opinion of the Board such release is not incompatible with the welfare of society, the Board may in its discretion authorize the release of such prisoner on parole."

Prior to the new guidelines and based upon the then existing statute and Parole Board procedures, it was generally believed by the courts that a defendant sentenced under 18 U.S.C. §4202 (now §4205(a)) would receive meaningful consideration for parole at the one-third point of his sentence. Such consideration was based upon the Parole Board's evaluation of an inmate's progress toward rehabilitation. Rehabilitation was in turn judged primarily by an inmate's adjustment to and behavior at the institution of confinement and upon the observations made of the inmate's attitude by the staff of the institution as well as by members of the Parole Board at the time they conducted their hearing on parole eligibility. Project, *supra*, Page 820; see also *Hyser v. Reed*, 318 F. 2d 225 (D.C. Cir. 1963); *Berry v. United States*, 412 F. 2d 189, 192 (3rd Cir. 1969); *United States v. Somers*, 552 F. 2d 108, 112 (3rd Cir. 1977).

B. Factual background in respondent Addonizio's case

Respondent was sentenced in September 1970, prior to the adoption of the new guidelines to a straight term of ten years pursuant to then 18 U.S.C. §4202. He first became eligible for parole on July 5, 1975 after having served one-third of his term. He was denied parole at that time and given a new eligibility date of January 1977. On December 8, 1976, a second institutional hearing was held by two hearing officers of the Parole Commission. The hearing was a very short one. The hearing officers did not question Mr. Addonizio or have any discussion with him in an effort to evaluate his progress and rehabilitation or his prospects for successful reintegration into society in the event parole was granted. They simply advised him that they had no authority to grant his application

for parole since he was designated a "central monitoring case". They further told him that they did not really have any questions for him—that with him it was not a question of rehabilitation, it was only a question "of how long they want you to stay here". (Affidavits of Hugh Addonizio dated January 6 and January 8, 1977, made a part of the record on appeal and never disputed by the government at any stage in the proceedings).

It is further undisputed that respondent's prison record was exemplary and that he had received only highest recommendations from the prison authorities. Nevertheless, on January 13, 1977, the National Parole Commission denied parole to respondent and continued him for regular review hearing in December 1977 (his approximate mandatory release date).

The reasons given by the Parole Commission for the denials of parole make clear that its decisions were based upon its own evaluation of the nature and circumstances of respondent's offense. See District Court Opinion (App. E); Third Circuit Opinion (App. A); and *United States Ex Rel. Addonizio v. Arnold*, 423 F. Supp. 189, 190 n. 4 (M.D. Pa. 1976).

On April 27, 1977, the sentencing court granted respondent's 28 U.S.C. §2255 motion vacating his original sentence and resentencing respondent to time served. On that date Mr. Addonizio had served five years and two months of his ten year sentence. The court, based upon the authority of the Third Circuit cases of *United States v. Salerno*, 538 F. 2d 1005, rehearing denied, 542 F. 2d 628 (3rd Cir. 1976) and *United States v. Somers*, 552 F. 2d 108 (3rd Cir. 1976), found it had jurisdiction under 28 U.S.C. §2255, because its reasonable intention and expectations at the time of sentencing had been frustrated by the new standards and procedures adopted subsequent to sentencing.

The court specifically stated that it had carefully considered the severity of respondent's crime in imposing the harsh ten year sentence (Respondent was a first offender. At the time of his conviction he had been serving his second term as Mayor of the City of Newark. Prior thereto he had a distinguished record of public service, including fourteen years as a member of Congress and had been a highly decorated World War II veteran.) and had expected respondent to receive "a meaningful parole hearing—that is, a determination based on his institutional record and the likelihood of recidivism upon completion of one-third (1/3) of his sentence . . . This sentencing expectation was based on the court's understanding—which was consistent with generally-held notions—of the operation of the parole system in 1970." (App. E—28a, 29a)

Instead the court found respondent's parole eligibility to have been decided on a reevaluation of the severity of his crime by the Parole Commission under the new standards and procedures not in existence and not contemplated at the time of sentence.

C. The decision of the Court of Appeals

The Third Circuit agreed that the District Court had jurisdiction to vacate and correct respondent's sentence under the particular circumstances of the case. Following its earlier decisions, the Third Circuit held that relief may be granted to an inmate where the import of the original sentence has been substantially changed as a result of application by the parole authorities of a set of guidelines and procedures not in existence at the time of sentencing and where those new guidelines and procedures

actually frustrate the reasonable intention and expectations of the sentencing judge at the time of sentencing. (App. A—9a)

Reasons for Denying the Petition

1. The holdings of the Third Circuit in those cases where it has found authority of the sentencing court to vacate and correct the sentence are extremely narrow and apply only to a limited set of circumstances and an ever decreasing number of inmates. The instant case must be read together with the earlier Third Circuit cases of *Salerno* and *Somers*.

Despite the government's contention of wide implication of the Court of Appeals' decision (Petition, p. 16, n. 12), the Third Circuit has been extremely careful to limit its holdings to those cases where sentence was imposed prior to the publication of the new guidelines in 1973 and where there can be a clear showing that the new guidelines and procedures have resulted in requiring an inmate to serve an appreciable longer term of imprisonment than could have been reasonably expected and intended at the time of imposition of sentence (App. A—9a). On the denial of the government's petition for rehearing in *Salerno*, 542 F. 2d 628 (3rd Cir. 1976), the Court stated:

"Our holding is narrow and does not vest sentencing courts, as alleged by petitioner 'with power of a super parole board'. Our decision does, however, 'permit the district court to correct a sentencing error where the import of the judge's sentence has in fact been changed by guidelines adopted by the Parole Board . . . subsequent to the imposition of that sentence.' *United States v. White*, 540 F. 2d 409, at 411 (8th Cir. 1976)."

In *Somers* the court again emphasized the limited nature of its ruling on the issue stating:

"We recognize the sentencing courts are not vested with those functions belonging to the Parole Board, *D'Allesandro v. United States*, 517 F. 2d 429 (2nd Cir. 1975) or 'with [the] power[s] of a super parole board.' *Silverman II*, supra. [Salerno Rehearing Decision]" 552 F. 2d 108, 114 (3rd Cir. 1977)

In short, the rule of the Third Circuit cases has no application to sentences imposed subsequent to the fall of 1973 and does not have "wide implications". If certiorari is granted, it is respectfully submitted that by the time a decision on the issue is rendered by this Court the population to which the case would apply would be all but non-existent.

2. The decisions of the Third and Eighth Circuits sought to be challenged by petitioner are well-reasoned, not inconsistent with decisions of this Court, and are based upon a thorough analysis and understanding of the changes in the parole decisionmaking process which occurred in 1973 and the prior unanticipated effect on sentences imposed prior to that time. It is respectfully submitted that the Third and Eighth Circuit cases holding inmates have a remedy under 28 U.S.C. §2255 under the facts and circumstances to which those cases are limited is entirely consistent with this Court's opinion in *Davis v. United States*, 417 U.S. 333.

While it cannot be disputed that there is a conflict in the Circuits on the issue, the conflict is not as clear-cut as would first appear. The Ninth Circuit, for example, in rejecting the reasoning of the Eighth Circuit in *Kortness v. United States*, 514 F. 2d 167 (8th Cir. 1975) and the Third Circuit cases stated:

"The *Kortness* court may have been influenced by the Eighth Circuit's rule that decisions to grant or deny parole are not subject to judicial review. *Brest v. Ciccone*, 371 F. 2d 981 (8th Cir. 1967). In contrast our Circuit permits the limited judicial review. E.g. *Grottan v. Sigler*, 525 F. 2d 329 (9th Cir. 1975)." *Andrino v. United States Board of Parole*, 550 F. 2d 519, 520 n.3 (9th Cir. 1977).

3. We submit that it is appropriate for this Court in its determination of whether or not to grant certiorari to consider the particular factual and personal background of respondent. Because he was a prominent public official at the time he was brought to trial, Mr. Addonizio's case was and continues to be followed closely by the press. The facts that six original co-defendants (five public officials and the reputed head of organized crime in New Jersey) were severed at the beginning of or during the trial either because of health reasons or unavailability of their trial counsel and never brought to final judgment, and that the two co-defendants convicted with Addonizio who received the same sentence as he were paroled a year before Addonizio's release by the court have been widely and repeatedly publicized in the press. The extraordinary effort of the government to have Addonizio reincarcerated pending the appeal from the District Court's granting of his §2255 motion also received wide publicity and adverse reaction from public officials and the general public alike at what appeared to be unduly harsh and oppressive treatment. (The Third Circuit ordered Addonizio reincarcerated pending the appeal and after having been out of prison from April 28, 1977, Mr. Addonizio was required to surrender himself for reincarceration on May 3, 1977. He remained in custody until May 12, 1977, when he was re-released by order of this Court.) Respondent has now been out of prison since May 12, 1977.

Given the past history of Mr. Addonizio's case, we respectfully submit it is unjust and unreasonable at the present time to require him to litigate an issue of extremely limited applicability and have to continue to face uncertainty about his personal status.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

MICHAEL EDELSON

*Counsel for Respondent, Hugh J.
Addonizio*

Gateway I

Newark, New Jersey 07102

SCARPONE & EDELSON

Of Counsel